Complaint in Proceeding 12-52

The Federal Communications Commission must include a consideration in its ruling regarding whether public agencies providing wireless service, who act to modify (either throttle or completely shut down) the service, will be regarded as common carriers in the context of 47 U.S.C. §153(11) or a telecommunications carrier as per 47 U.S.C. §153 (51). This should also address the aggregator exclusion issue at 47 U.S.C. §226(a)(2) and address whether such a public agency should be considered a common carrier or telecommunication carrier (subject to the Communications Act) regardless of whether any commercial mobile service provided is deemed by the Commission to be granted to the public for profit or not for profit. The fact that this is not directly addressed in the questions in the notice, except for the question of whether "common carrier" obligations may exist (in question 6(b) in the notice) makes it somewhat more difficult to contemplate, for example, how public agencies that act to modify (throttle or shut down) service shall be considered in the context of CALEA and 47 U.S.C. §332(c)(1), for example, in addition to considerations of how a petitioner, complainant, or commenter should consider the status of a public agency that has taken steps to cut off wireless service to large numbers of persons. (I reflect here upon the Federal Communication's own rules referring to carriers, for example, at the FCC's page providing guidance for Discontinuance of Service and a link to the rules of 47 CFR §63.71, at http://transition.fcc.gov/wcb/cpd/other_adjud/business214.html)

Under e-CFR data current as of April 5, 2012, at 47 CFR §22.99, a Telecommunications common carrier is defined as "An individual, partnership, association, joint-stock company, trust or corporation engaged in rendering radio telecommunications services to the general public for hire." The intent of the Communications Act was, according to the record, not intended to include "any person if not a common carrier in the ordinary sense of the term." [HR Conf. Rep. No. 1918, 73d Cong., 2d Sess. 46 (1934)] It is therefore the obligation of the Federal Communications Commission to treat a public agency (including any special districts created by a State, such as the San Francisco Bay Area Rapid Transit District) as a telecommunications common carrier subject to the Communications Act of 1934, as well as any other entities covered by the definition at 47 CFR §22.99 (which I understand to be the "ordinary sense of the term" as referred to in the 1934 HR Conference Report on the Commmunications Act). I also am positing that the references to "radio telecommunications services" and "radiotelephone" at 47 CFR §22.99 equates to cellular phone, or CMRS services, as would be considered within the context of the Communications Act of 1934 (and I quote from the Act in part here): "the term "public mobile services" means air-to-ground radiotelephone services, cellular radio telecommunications services, offshore radio, rural radio service, public land mobile telephone service, and other common carrier radio communication services covered by part 22 of title 47 of the Code of Federal Regulations(…)" In this way, the FCC can best act in, and defend, the public interest.

In the U.S. Supreme Court it was stated that, "Congress meant to confer "broad authority" on the Commission, H. R. Rep. No. 1850, 73d Cong., 2d Sess., 1 (1934), so as "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." FCC v.

Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). To that end, Congress subjected to regulation "all interstate and foreign communication by wire or radio." (U.S. Supreme Court, FCC vs. Midwest Video Corp., No. 77-1575 (1979)) There is also the matter of how a public agency will serve indifferently and how this leads public agencies (including special districts created by a State) and individuals, or various corporate actors who collaborate with them in acts leading to a modification (throttling or shutdown of cellular and / or wireless internet (network)) down the road to common carrier status (considering this in the context of NARUC: National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C.Cir.), cert. denied, 425 U.S. 992, 96 S.Ct. 2203, 48 L.Ed.2d 816 (1976) (NARUC I ); providing a service whereby customers may " 'transmit intelligence of their own design and choosing.' " Computer and Communications Industry Association v. Federal Communications Commission, 693 F.2D 198, 209, 224 U.S.APP.D.C. 83 (D.C. Cir. 1982); serving indifferently generally without legal requirement resulting in common carrier status, National Ass'n of Regulatory Utility Com'rs v. FCC, 533 F.2d 601, 174 U.S. App. D.C. 374 (1976)). To me personally, it is clear from a reading of all this that any individuals, partnerships, associations, joint-stock companies, trusts, or corporations which were engaged (in any way) in rendering radio telecommunications services to the general public on August 11, 2011 in San Francisco, or anyone who does so in the future, should be treated as telecommunications common carriers subjected to the Communications Act of 1934, and the Federal Communications Commission must make this evident in any eventual ruling emanating from this proceeding. It is particularly disturbing to note that in this case, people who sit on elected bodies of public agencies may actually believe that if they are going to shut off a Distributed Antenna System, otherwise interfere with CMRS, or direct their agents to do so, they can evade the requirement of having to go to a court, or to the FCC or alternatively a State Commission, to obtain an order or ruling authorizing modification of service, or worse, that some agencies simply believe that any federal or state requirements are inapplicable to them, making the urgency of a ruling on this matter even more significant.

I urge the Commission to consider the statements in this complaint and incorporate this reasoning as staff and the Commission prepare to make a ruling. It is not necessary that I petition the Commission on this (in addition to this complaint), although I will submit a comment into this proceeding. This is because I already incorporated a petition into this proceeding, consistent with Commission rules and guidance. To support this complaint further, I ask that the staff and the Commission consider the thoughts presented with the ex parte presentation submitted by me on 3/30/2012 (posted into ECFS on 4/02/2012) and which includes reasoning and statements within the context of the Communications Act of 1934, describing sections of concern within the Act that have direct bearing on this proceeding, including those within my petition. The ex parte presentation includes copy of required service of process so as to include it in this proceeding (as it includes copy of a petition for declaratory ruling that seeks Commission preemption of state or local regulatory authority) as required by 47 CFR 1.1206: http://apps.fcc.gov/ecfs/comment/view?id=6017027782 Thank you for your consideration.